

No. 15055

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**United States**  
**Court of Appeals**  
**For the Ninth Circuit**

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BEAUMONT SILVERTON, Individually and as a  
Member Representative and Secretary of Team-  
ster Local Union No. 898, Affiliated With the  
International Brotherhood of Teamsters,  
Chauffeurs, Warehousemen and Helpers of  
America and the American Federation of  
Labor,

Appellant,

vs.

VALLEY TRANSIT CEMENT COMPANY,  
INC., a Corporation,

Appellee.

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**Transcript of Record**

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**Appeal from the United States District Court for the**  
**Southern District of California,**  
**Southern Division.**



1. **Contract Between Buyer and Seller:** The terms and conditions herein set forth, together with those relating to specifications, quantity, price, freight allowance, delivery dates and shipping, packing, and invoicing instructions and those special terms and conditions attached, if any, shall constitute the entire contract between Buyer and Seller with respect to the subject matter thereof, and said contract shall not be amended, modified or rescinded except by written agreement signed by an officer or authorized official of each company, expressly referring to this contract.
2. **Delays:** Seller shall not be responsible for any failure or delay in delivery due to fire, floods, strikes or labor troubles of any kind whether or not due to fault of Seller, breakdowns, delay of carriers, total or partial failure for any reason of usual sources of supply, limited production, precedence or priorities given at the request or for the benefit, directly or indirectly, of any government or any subdivision, agency or instrumentality thereof, laws, regulations or restrictions of any government or any subdivision, agency or instrumentality thereof, or any similar or dissimilar cause beyond Seller's control. For any cause whatsoever, whether beyond Seller's control or not, Seller's liability for failure or delay hereunder to the material with respect to which such failure or delay in delivery is experienced and the established market price of such material is like quantities as specified herein at the date on which delivery is required hereunder if such market price is higher than the said price applicable hereunder, or (2) five percent (5%) of the price applicable hereunder to such material. Any course of dealing between the parties to the contrary notwithstanding, at Seller's election any claim for failure or delay in delivery shall be deemed waived by Buyer unless presented in writing to Seller within thirty (30) days from the date on which delivery is required hereunder. In the event of inability of Seller for any cause or all Buyers, including subsidiaries, affiliates and departments of Seller, on such basis as Seller, in its sole discretion may decide upon, without liability for any failure to perform this contract which may be a consequence thereof.
3. **Tolerance:** This total order and each delivery hereunder shall be subject to a tolerance of ten percent (10%), plus or minus, in yield and quantity.
4. **Shipping Dates:** Unless a definite requested shipping date is shown on the face of the purchase order, Buyer shall furnish such date upon notice from Seller. In the event that shipment dates are requested by Buyer after issuance of its purchase order, such shipment dates shall be subject to Seller's approval.
5. **Warranty:** Seller undertakes that products sold hereunder to Buyer shall be free from defects in material and workmanship and shall conform to specifications. This express warranty is in lieu of and excludes all other warranties, guarantees or representations, express or implied, by or to specifications, to Seller, after inspection by Seller, or at Seller's election, subject to inspection by Seller. Material returned by Buyer must be returned in same condition as when received by Buyer. Defective material, or material not conforming to specifications, as returned shall be replaced or repaired by Seller without any additional charge, or, in lieu of such replacement or repair, if Seller so desires, Seller may refund the purchase price applicable to such material. Seller agrees to pay return transportation charges not exceeding those which would apply from the original destination on all defective material, or material not meeting specifications. However, Seller shall not be obligated for such charges when material returned proves to be free from defect and to meet specifications. Material which proves to be free from defect and to meet specifications shall be held by Seller for shipping instructions and Buyer shall furnish such instructions promptly upon request. Seller's liability shall be limited solely to the replacement or repair of any defective material, or material not meeting specifications, or to refunding the purchase price applicable to such defective material or material not meeting specifications. Seller shall not be liable for any consequential damages nor and service charges not expressly authorized by Seller and die, equipment and machine breakage. Any course of dealing between the parties to the contrary notwithstanding, at Seller's election any claim shall be deemed waived by Buyer unless presented in writing to Seller within sixty (60) days from the date of the receipt of the material to which such claim relates.
6. **Advice by Seller:** The giving or failure to give advice, notice, suggestions, instructions, or recommendations of any character by Seller, including but not limited to, any regarding designs, color, shapes, sizes, alloy, temper, specifications, or wording on, or use or characteristics or suitability of material sold to Buyer shall not impose any liability upon Seller nor grant to Buyer any license to the use of any of Seller's patents, trade-marks or trade names.
7. **Credits:** All shipments to be made hereunder shall at all times be subject to the approval of Seller's Credit Department, and if the financial responsibility of Buyer is unsatisfactory, or becomes impaired, or if Buyer fails to make any payment in accordance with the terms of the contract, then, in any such event, Seller may defer or decline to make any shipments hereunder except upon receipt of satisfactory security or cash payments in advance, or it may terminate the contract. Terms of payment shall be as set forth on the face hereof.
8. **Assignment:** This contract, together with all rights, liabilities and obligations arising thereunder, may be assigned wholly or in part by Seller to any one or more of the corporations subsidiary to or affiliated with Seller, without the necessity of prior notice to Buyer.
9. **Taxes:** In addition to the price specified herein, the amount of any present or future sales, use, excise or other tax applicable to the sale, thereof the Buyer shall provide Seller with a tax-exemption certificate acceptable to the taxing authorities and Buyer agrees to indemnify and hold harmless Seller of and from all loss, damage or liability occasioned by or arising out of Buyer's failure or delay in paying such tax, or providing such certificates.
10. **Changes:** Seller assumes no responsibility for any changes in the specifications outlined in the original order, unless such changes are confirmed in writing by Buyer and accepted in writing by Seller. Any price variation resulting from such changes shall become effective immediately upon the acceptance of such changes.
11. **Price:** (a) The price specified in this contract for any material or articles which are now or hereafter covered by a published list price of Seller may be changed by Seller at any time upon written notice to Buyer to conform with Seller's published list price current at the effective date of change. (b) The price specified in this contract for any material or articles which are not covered by any published list price of Seller may be increased by Seller upon twenty (20) days' written notice to Buyer. In the event Buyer is not willing to accept such increase pursuant to this subparagraph (b), Buyer shall so notify Seller in writing within seven (7) days from receipt of the notice of the increase and that portion of this order to which such price increase is applicable shall be deemed canceled unless within seven (7) days from receipt of Buyer's notice, Seller gives written notice of its election to withdraw the proposed increase.
12. **Equipment:** Any equipment (including jigs, printing plates or cylinders, dies and tools, but excluding patterns) which Seller constructs or acquires specifically for use on Buyer's order shall be and remain Seller's property and in Seller's sole possession and control, and any charges made by Seller therefor shall be for the use of such equipment only. All such equipment will be used exclusively for the manufacture of products for Buyer. When for a period of one (1) year no orders are accepted from Buyer for products to be made with such equipment, Seller may make such use or disposition thereof as it desires without liability to Buyer. Such equipment or any material owned or furnished by Buyer while in Seller's possession will be carefully handled and stored by Seller, but Seller shall have no responsibility for loss or damage thereto. Tool charges designated as estimated will vary in accordance with actual cost.
13. **Patents:** If any material shall be manufactured or sold by Seller to meet Buyer's specifications or requirements and is not a part of Seller's standard line offered by it to the trade generally in the usual course of Seller's business, Buyer agrees to defend, protect and save harmless Seller against all suits at law or in equity and from all damage, claims and demands for actual or alleged infringement of any United States or foreign patent and to defend any suits or actions which may be brought against Seller for any alleged infringement because of the manufacture or sale of any such material.
14. **Point of Delivery:** Delivery to carrier at point of shipment shall constitute delivery to Buyer and Buyer shall assume all risk for subsequent loss or damage. The fact that in some instances a different "F. O. B." point may be shown on the face hereof, or that all or a part of freight charges may be prepaid, assumed, or allowed by Seller, is for Buyer's convenience and shall not affect the fact that delivery to carrier at point of shipment shall constitute delivery to Buyer.
15. **Waivers:** No waiver by Seller of any breach of any provision hereof shall constitute a waiver of any other breach or of such provision. Seller's failure to object to provisions contained in any communication from Buyer shall not be deemed an acceptance of such provisions or as a waiver of the provisions of this contract.
16. **Cancellation:** This contract is subject to cancellation only upon Seller's accepting such cancellation in writing, and the effective date of such cancellation shall be the date of such acceptance. The date of such acceptance notwithstanding, Seller shall have the right to continue the processing of the materials or articles affected to the point at which the processing can be halted with the least inconvenience to Seller under the circumstances. In the event of acceptance of cancellation, at Seller's election Seller may assess cancellation charges against Buyer, which charges shall consist of the expenses incurred by Seller to the date of acceptance of cancellation and/or the date of the halting of processing, plus the profit anticipated by Seller on the canceled portion of the order, less allowance for scrap at the price then currently paid by Seller for scrap of the type resulting from the cancellation of the order. Payment of cancellation charges shall be made by Buyer upon receipt of statement of same. Cancellation charges shall not exceed the purchase price of the canceled portion of the contract.



No. 15055

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United States  
Court of Appeals  
For the Ninth Circuit

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BEAUMONT SILVERTON, Individually and as a  
Member Representative and Secretary of Team-  
ster Local Union No. 898, Affiliated With the  
International Brotherhood of Teamsters,  
Chauffeurs, Warehousemen and Helpers of  
America and the American Federation of  
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Transcript of Record

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Appeal from the United States District Court for the  
Southern District of California,  
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## INDEX

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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in *italic*; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in *italic* the two words between which the omission seems to occur.]

	PAGE
Attorneys, Names and Addresses of.....	1
Certificate by Clerk.....	38
Complaint .....	3
Judgment of Dismissal.....	36
Motion and Notice of Motion to Dismiss.....	34
Notice of Appeal.....	37
Statement of Points and Designation of Record	40





## NAMES AND ADDRESSES OF ATTORNEYS

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HORTON & KNOX,  
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In the District Court of the United States in and  
for the Southern District of California, South-  
ern Division

No. 1485

BEAUMONT SILVERTON, Individually and as a  
Member, Representative and Secretary of  
Teamsters Local Union No. 898, Affiliated With  
the International Brotherhood of Teamsters,  
Chauffeurs, Warehousemen and Helpers of  
America, and the American Federation of  
Labor, an Unincorporated Association,

Plaintiff,

vs.

VALLEY TRANSIT CEMENT COMPANY,  
INC., a Corporation; Black Company, 1-5, In-  
clusive, Copartnerships; White Company, 1-5,  
Inclusive, Corporations; Doe 1-50, Inclusive.

Defendants.

COMPLAINT FOR AN ACCOUNTING, FOR  
BREACH OF CONTRACT AND UNFAIR  
LABOR STANDARDS ACT

Comes Now Plaintiff and complains of the de-  
fendants and each of them, and for cause of action  
alleges:

First Cause of Action

I.

That jurisdiction is conferred upon this Court by  
Section 301(a), Labor Management Relations Act,

1947, a law of the United States regulating commerce.

## II.

That prior to January 1, 1948, and at all times since, defendants have been engaged in the business of mixing, transportation and pouring of ready mixed concrete, sand and gravel; that during said time, such materials have been furnished and used by defendants for the maintenance, upkeep and repair of state highways, bridges and trestles, which were, have been and now are used regularly by vehicles [2\*] moving in interstate commerce; that defendants have mixed, furnished, transported and supplied, during all of said time, sand, gravel and ready mixed concrete used in the construction, maintenance and repair of factories, canals, irrigation projects, and other instrumentalities of interstate commerce; that defendants, during said period, transported, furnished and used trucks and other equipment, and sold, delivered, furnished and used rock, sand and gravel in the State of Arizona, all of which equipment and material was transported to Arizona from the State of California.

By reason of the above, the activities of the defendants affect interstate commerce.

## III.

That the defendant, Valley Transit Cement Company, Inc., is now and at all times herein mentioned was a corporation organized and existing under and by virtue of the laws of the State of California,

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\*Page numbering appearing at foot of page of original Certified Transcript of Record.

with its principal office for the transaction of business in the County of Imperial, in said State. That the defendants, White Company, 1-5, inclusive, corporations, do each of them have a principal place of business in the County of Imperial, State of California. That the defendants, Doe 1-50, inclusive, are residents of the County of Imperial, State of California.

#### IV.

That the defendants Black Company, 1-5, inclusive, copartnerships, White Company, 1-5, inclusive, corporations, Doe 1-50, inclusive, are sued herein under fictitious names, their true names and capacities to plaintiff being unknown; that when such true names and capacities are ascertained, plaintiff will ask leave of Court to amend this complaint by inserting said true names and capacities herein. [3]

#### V.

That the Teamsters Local Union No. 898, affiliated with the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, A. F. of L., is an unincorporated association functioning as a labor union.

#### VI.

That at all times mentioned herein, Beaumont Silvertown has been and now is a member, representative and Secretary of said plaintiff union.

#### VII.

That prior to the commencement of this action the obligation herein sued upon was assigned to plain-

tiff by Thomas T. Johnson, and plaintiff is now the lawful holder thereof.

### VIII.

That defendants hired plaintiff's assignor to render services for defendants, and agreed to pay to said person therefore the wages called for by the written collective bargaining agreement in existence between plaintiffs and defendants, and plaintiff's assignor accepted said offer of employment upon said terms and conditions, and did, upon the date set forth after his name in Exhibit "A" which is attached hereto and incorporated herein by reference with the same force and effect as if set forth herein and at length, enter into the performance of the duties as an employee of defendants, and has at all times mentioned herein been an employee of defendants.

### IX.

That on or about November 1, 1948, plaintiff union and defendants entered into a written collective bargaining agreement covering wages, hours and conditions of employment for the employees of the defendants and each of them, which said written agreement was in full force and effect from November 1, 1948, to January 5, 1951. [4]

### X.

That a true and correct copy of Article IV of said written agreement covering wages and classifications from November 1, 1948, to and inclusive of November 1, 1949, is attached hereto as Exhibit "B" and incorporated herein by reference with the same force and effect as if set forth herein at length.



## XI.

That a true and correct copy of Article IV of said written agreement covering wages and classifications from November 1, 1949, to and inclusive of January 4, 1950, is attached hereto as Exhibit "C" and incorporated herein by reference with the same force and effect as if set forth herein at length.

## XII.

That a true and correct copy of Article IV of said written agreement covering wages and classifications from January 5, 1950, to and inclusive of January 5, 1951, is attached hereto as Exhibit "D" and incorporated herein by reference with the same force and effect as if set forth herein at length.

## XIII.

That at all times herein mentioned and from November 1, 1948, to January 5, 1951, inclusive, as aforesaid, the defendants and each of them have not been paying to plaintiff's assignor to work in excess of 8 hours per day or 40 hours per week, and have not paid said employee time and one-half for hours in excess of 8 hours in any one day or 40 hours in any one week, and have paid the employees less than the minimum straight time wage provided for in said agreements. [5]

## XIV.

That during said period plaintiff's assignor has worked in various classifications set forth in said written collective bargaining agreement; that the exact classifications, period worked in such classifi-



cations and wages paid are unknown to plaintiff or to plaintiff's assignor, but defendants have in their possession time cards, records and data showing all of such information.

#### XV.

That plaintiff has no knowledge of the exact amounts paid, nor does plaintiff have knowledge of the exact number of overtime hours worked by said employee; but plaintiff is informed and believes and on such information and belief alleges that there is due to plaintiff's assignor the approximate sums set forth after his name in Exhibit "A." That defendants have in their possession and under their control a full and complete record of hours worked and wages paid to said employee, and that said records are under the exclusive control of defendants and each of them.

#### XVI.

That defendants have failed, neglected and refused, and do now fail, neglect and refuse to account to plaintiff or to plaintiff's assignor for the wages due plaintiff's assignor, although often requested by plaintiff so to do, and the defendants have refused and now refuse to pay to the plaintiff full wages as provided in said written agreement; that it is necessary that an accounting be had in order that the amounts payable and due the plaintiff from said defendants can be determined.

#### XVII.

That defendants and each of them wilfully failed

and refused to pay the wages provided for in said collective bargaining agreement.

For a Further, Second, Separate and Distinct Cause of Action, Plaintiff Alleges: [6]

I.

Plaintiff repeats and repleads each and every allegation and statement contained in paragraphs I, II, III, IV, VI, VII, VIII, IX, X, XI, XII, XIII, XIV, XV, XVI and XVII of the first cause of action, and incorporates them herein by reference as if set forth in full and at length.

II.

That prior to the commencement of this action the obligation herein sued upon was assigned to plaintiff by John Howard Glass, and plaintiff is now the lawful holder thereof.

For a Further, Third, Separate and Distinct Cause of Action, Plaintiff Alleges:

I.

Plaintiff repeats and repleads each and every allegation and statement contained in paragraphs I, II, III, IV, VI, VII, VIII, IX, X, XI, XII, XIII, XIV and XV of the first cause of action and incorporates them herein by reference as if set forth in full and at length.

II.

That prior to the commencement of this action the obligation herein sued upon was assigned to

plaintiff by H. B. Turner, and plaintiff is now the lawful holder thereof.

For a Fourth, Separate and Distinct Cause of Action, Plaintiff Alleges:

I.

Plaintiff repeats and repleads each and every allegation and statement contained in paragraphs I, II, III, IV, VI, VII, VIII, IX, X, XI, XII, XIII, XIV and XV of the first cause of action and incorporates them herein by reference as if set forth in full and at length. [7]

I.

That prior to the commencement of this action the obligation herein sued upon was assigned to plaintiff by Truman Gregory, and plaintiff is now the lawful holder thereof.

For a Fifth, Separate and Distinct Cause of Action, Plaintiff Alleges:

I.

Plaintiff repeats and repleads each and every allegation and statement contained in paragraphs I, II, III, IV, VI, VII, VIII, IX, X, XI, XII, XIII, XIV and XV of the first cause of action and incorporates them herein by reference as if set forth in full and at length.

II.

That prior to the commencement of this action the obligation herein sued upon was assigned to

plaintiff by James E. Butler, and plaintiff is now the lawful holder thereof.

For a Sixth, Separate and Distinct Cause of Action,  
Plaintiff Alleges:

I.

Plaintiff repeats and repleads each and every allegation and statement contained in paragraphs I, II, III, IV, VI, VII, VIII, IX, X, XI, XII, XIII, XIV and XV of the first cause of action and incorporates them herein by reference as if set forth in full and at length.

II.

That prior to the commencement of this action the obligation herein sued upon was assigned to plaintiff by Ben Rose, and plaintiff is now the lawful holder thereof.

For a Seventh, Separate and Distinct Cause of Action, Plaintiff Alleges: [8]

I.

Plaintiff repeats and repleads each and every allegation and statement contained in paragraphs I, II, III, IV, VI, VII, VIII, IX, X, XI, XII, XIII, XIV and XV of the first cause of action and incorporates them herein by reference as if set forth in full and at length.

II.

That prior to the commencement of this action the obligation herein sued upon was assigned to plaintiff by Lester Hogan, and plaintiff is now the lawful holder thereof.

For an Eighth, Separate and Distinct Cause of Action, Plaintiff Alleges:

I.

Plaintiff repeats and repleads each and every allegation and statement contained in paragraphs I, II, III, IV, VI, VII, VIII, IX, X, XI, XII, XIII, XIV and XV of the first cause of action and incorporates them herein by reference as if set forth in full and at length.

II.

That prior to the commencement of this action the obligation herein sued upon was assigned to plaintiff by L. L. Chidester, and plaintiff is now the lawful holder thereof.

For a Ninth, Separate and Distinct Cause of Action, Plaintiff Alleges:

I.

Plaintiff repeats and repleads each and every allegation and statement contained in paragraphs I, II, III, IV, VI, VII, VIII, IX, X, XI, XII, XIII, XIV and XV of the first cause of action and incorporates them herein by reference as if set forth in full and at length.

II.

That prior to the commencement of this action the obligation [9] herein sued upon was assigned to plaintiff by James M. Turner, and plaintiff is now the lawful holder thereof.

For a Tenth, Separate and Distinct Cause of Action, Plaintiff Alleges:

I.

Plaintiff repeats and repleads each and every allegation and statement contained in paragraphs I, II, III, IV, VI, VII, VIII, IX, X, XI, XII, XIII, XIV and XV of the first cause of action and incorporates them herein by reference as if set forth in full and at length.

II.

That prior to the commencement of this action the obligation herein sued upon was assigned to plaintiff by Tom W. Garrett, and plaintiff is now the lawful holder thereof.

For an Eleventh, Separate and Distinct Cause of Action, Plaintiff Alleges:

I.

Plaintiff repeats and repleads each and every allegation and statement contained in paragraphs I, II, III, IV, VI, VII, VIII, IX, X, XI, XII, XIII, XIV and XV of the first cause of action and incorporates them herein by reference as if set forth in full and at length.

II.

That prior to the commencement of this action the obligation herein sued upon was assigned to plaintiff by Bert N. Loop, and plaintiff is now the lawful holder thereof.



For a Twelfth, Separate and Distinct Cause of Action, Plaintiff Alleges:

I.

Plaintiff repeats and repleads each and every allegation and statement contained in paragraphs I, II, III, IV, VI, VII, VIII, IX, X, XI, XII, XIII, XIV and XV of the first cause of action and [10] incorporates them herein by reference as if set forth in full and at length.

II.

That prior to the commencement of this action the obligation herein sued upon was assigned to plaintiff by Charles M. Parker, and plaintiff is now the lawful holder thereof.

For a Thirteenth, Separate and Distinct Cause of Action, Plaintiff Alleges:

I.

Plaintiff repeats and repleads each and every allegation and statement contained in paragraphs I, II, III, IV, VI, VII, VIII, IX, X, XI, XII, XIII, XIV and XV of the first cause of action and incorporates them herein by reference as if set forth in full and at length.

II.

That prior to the commencement of this action the obligation herein sued upon was assigned to plaintiff by James L. Johnson, and plaintiff is now the lawful holder thereof.



For a Fourteenth, Separate and Distinct Cause of Action, Plaintiff Alleges:

I.

Plaintiff repeats each and every allegation and statement contained in the First Cause of Action and incorporates them herein by reference.

II.

That jurisdiction of this cause of action is conferred upon the Court by the provisions of the Act of June 25, 1938, C. 676, Stats. 1069, 29 U.S.C. Secs. 201, 219, known as the Fair Labor Standards Act of 1938, a law of the United States regulating commerce.

III.

That prior to January 1, 1948, and at all times since, defendants [11] have been engaged in the business of mixing, transportation and pouring of ready mixed concrete, sand and gravel; that during said time, such materials have been furnished and used by defendants for the maintenance, upkeep and repair of state highways, bridges and trestles, which were, have been and now are used regularly by vehicles moving in interstate commerce; that defendants have mixed, furnished, transported and supplied, during all of said time, sand, gravel and ready mixed concrete used in the construction, maintenance and repair of factories, canals, irrigation projects, and other instrumentalities of interstate commerce; that defendants, during said period, transported, furnished and used trucks and other

equipment, and sold, delivered, furnished and used rock, sand and gravel in the State of Arizona, all of which equipment and material was transported to Arizona from the State of California.

By reason of the above, the activities of the defendants affect interstate commerce.

#### IV.

That during said period, plaintiff's assignor was an employee of defendants and as such was during the course of said employment engaged in interstate commerce, and as such did render during the course of said employment services for defendants, and each of them, in connection with the activities of defendants, said services consisting of driving trucks and other vehicles, lubricating, repairing, operating and maintaining trucks, mixing and other equipment, and mixing and pouring concrete.

#### V.

At and during such time, under the provisions of the said Fair Labor Standards Act of 1938, plaintiff's assignor was entitled to receive from defendants as his rate of pay for all overtime hours, or hours worked in excess of forty (40) hours per week, a rate of pay equivalent to one and one-half times the said straight time, regular rate of pay. Plaintiff has demanded an accounting of the [12] sums so due and payment thereof, but defendants have failed, refused and neglected to pay said wages, or any part thereof.

VI.

It has become necessary for plaintiff to engage, and this plaintiff has accordingly engaged, the services of attorneys to file and prosecute this action on plaintiff's behalf against defendants and each of them.

For a Fifteenth, Separate and Distinct Cause of Action, Plaintiff Alleges:

I.

Plaintiff repeats and repleads each and every allegation and statement contained in the Second Cause of Action, and incorporates them herein by reference.

II.

Plaintiff repeats and repleads each and every allegation and statement contained in paragraphs II, III, IV, V and VI of the Fourteenth Cause of Action and incorporates them herein by reference.

For a Sixteenth, Separate and Distinct Cause of Action, Plaintiff Alleges:

I.

Plaintiff repeats and repleads each and every allegation and statement contained in the Third Cause of Action, and incorporates them herein by reference.

II.

Plaintiff repeats and repleads each and every allegation and statement contained in paragraphs II, III, IV, V and VI of the Fourteenth Cause of Action and incorporates them herein by reference.

For a Seventeenth, Separate and Distinct Cause of Action, Plaintiff Alleges:

I.

Plaintiff repeats and repleads each and every allegation and statement contained in the Fourth Cause of Action, and incorporates [13] them herein by reference.

II.

Plaintiff repeats and repleads each and every allegation and statement contained in paragraphs II, III, IV, V and VI of the Fourteenth Cause of Action, and incorporates them herein by reference.

For an Eighteenth, Separate and Distinct Cause of Action, Plaintiff Alleges:

I.

Plaintiff repeats and repleads each and every allegation and statement contained in the Fifth Cause of Action, and incorporates them herein by reference.

II.

Plaintiff repeats and repleads each and every allegation and statement contained in paragraphs II, III, IV, V, and VI of the Fourteenth Cause of Action and incorporates them herein by reference.

For a Nineteenth, Separate and Distinct Cause of Action, Plaintiff Alleges:

I.

Plaintiff repeats and repleads each and every allegation and statement contained in the Sixth Cause

of Action, and incorporates them herein by reference.

II.

Plaintiff repeats and repleads each and every allegation and statement contained in paragraphs II, III, IV, V and VI of the Fourteenth Cause of Action and incorporates them herein by reference.

For a Twentieth, Separate and Distinct Cause of Action, Plaintiff Alleges:

I.

Plaintiff repeats and repleads each and every allegation and statement contained in the Seventh Cause of Action, and incorporates them herein by reference. [14]

II.

Plaintiff repeats and repleads each and every allegation and statement contained in paragraphs II, III, IV, V and VI of the Fourteenth Cause of Action and incorporates them herein by reference.

For a Twenty-first, Separate and Distinct Cause of Action, Plaintiff Alleges:

I.

Plaintiff repeats and repleads each and every allegation and statement contained in the Eighth Cause of Action, and incorporates them herein by reference.

II.

Plaintiff repeats and repleads each and every allegation and statement contained in paragraphs II,



III, IV, V and VI of the Fourteenth Cause of Action and incorporates them herein by reference.

For a Twenty-second, Separate and Distinct Cause of Action, Plaintiff Alleges:

I.

Plaintiff repeats and repleads each and every allegation and statement contained in the Ninth Cause of Action, and incorporates them herein by reference.

II.

Plaintiff repeats and repleads each and every allegation and statement contained in paragraphs II, III, IV, V and VI of the Fourteenth Cause of Action and incorporates them herein by reference.

For a Twenty-third, Separate and Distinct Cause of Action, Plaintiff Alleges:

I.

Plaintiff repeats and repleads each and every allegation and statement contained in the Tenth Cause of Action, and incorporates them herein by reference.

II.

Plaintiff repeats and repleads each and every allegation and [15] statement contained in paragraphs II, III, IV, V and VI of the Fourteenth Cause of Action and incorporates them herein by reference.

For a Twenty-fourth, Separate and Distinct Cause of Action, Plaintiff Alleges:

I.

Plaintiff repeats and repleads each and every allegation and statement contained in the Eleventh Cause of Action, and incorporates them herein by reference.

II.

Plaintiff repeats and repleads each and every allegation and statement contained in paragraphs II, III, IV, V and VI of the Fourteenth Cause of Action and incorporates them herein by reference.

For a Twenty-fifth, Separate and Distinct Cause of Action, Plaintiff Alleges:

I.

Plaintiff repeats and repleads each and every allegation and statement contained in the Twelfth Cause of Action, and incorporates them herein by reference.

II.

Plaintiff repeats and repleads each and every allegation and statement contained in paragraphs II, III, IV, V and VI of the Fourteenth Cause of Action and incorporates them herein by reference.

For a Twenty-sixth, Separate and Distinct Cause of Action, Plaintiff Alleges:

I.

Plaintiff repeats and repleads each and every allegation and statement contained in the Thirteenth



Cause of Action, and incorporates them herein by reference.

## II.

Plaintiff repeats and repleads each and every allegation and statement contained in paragraphs II, III, IV, V and VI of the Fourteenth Cause of Action and incorporates them herein by reference. [16]

Wherefore, plaintiff prays judgment as follows:

1. For an accounting and the payment to plaintiff of all sums due.
2. That the sums due for hours worked in excess of 40 hours in any one week be trebled.
3. For damages due under the Fair Labor Standards Act.
4. For reasonable attorneys' fees.
5. For costs of suit herein incurred.
6. For such other and further relief as may be just and proper in the premises.

JOHN C. STEVENSON &  
LIONEL RICHMAN,

By /s/ LIONEL RICHMAN,  
Attorneys for Plaintiff. [17]

## EXHIBIT A

Thomas T. Johnson—November 1, 1948....	\$5000.00
John Howard Glass—April 1, 1946.....	5000.00
H. B. Turner—November 1, 1948.....	5000.00
Truman Gregory—February 12, 1950.....	1000.00
James E. Butler—February 1, 1949.....	3000.00
Ben Rose—March 23, 1948.....	5000.00
Lester Hogan—August 23, 1948.....	5000.00
L. L. Chidester—December 1, 1949.....	2500.00
James M. Turner—November 1, 1948.....	5000.00
Tom W. Garrett—August 23, 1948.....	5000.00
Bert N. Loop—December 4, 1948.....	4850.00
Charles M. Parker—November 25, 1948....	4950.00
James L. Johnson—September 19, 1947....	5000.00

## EXHIBIT B

## Article IV.

Section 1. The schedule of wages to be paid under this Agreement to the various classifications of employees is as follows:

Classification	Minimum Straight Time Wage Rates Effective Nov. 1, 1948
Drivers of Plant Trucks, 8 tons and under....	\$1.50
over 8 tons to 12 tons inc. ....	1.55
Drivers of 4 wheel trucks .....	1.50
6 wheel trucks .....	1.55
Drivers of semis under 14 tons .....	1.60

Drivers of truck-trailer & semis .....	1.65
Drivers of transit mix trucks:	
4 yds. and under .....	1.70
over 4 yds. ....	1.85
Drivers of flats: Under 5 tons .....	1.50
over 5 tons .....	1.60
Drivers of flats truck-trailers & semis.....	1.70
Gas station operators .....	1.45
Washers .....	1.50
Greasers .....	1.60
Tiremen .....	1.60
Warehousemen .....	1.45
Warehouse foreman .....	1.50
Mechanic .....	1.90
Mechanic helpers .....	1.75
Bunkerman & loaders .....	1.45
Batch plant operators (manual) .....	1.70

Section 2. In all classifications time and one-half the straight time shall be paid for all time classed as overtime at the rate paid in the period overtime occurred. [19]

Section 3. Eight (8) hours shall constitute the regular work day. Forty (40) hours, beginning on Monday, shall constitute the regular straight-time work-week except that:

(a) In weeks in which a holiday occurs or the employee is off a day because of an excused absence, or laid off because of lack of work, the straight-time work-week is 32 hours.

(b) In weeks in which a holiday occurs, or the employee is off two days because of an excused ab-

sence, or laid off because of lack of work then the work-week is 24 hours.

Overtime at one and one-half ( $1\frac{1}{2}$ ) times the straight-time rate will be paid for hours worked over eight (8) per day or forty (40) straight-time hours per week, except that in work-weeks in which holidays or excused absences occur, then overtime shall be paid for hours over 32 or 24, as the case may be. If an employee works only Saturday and/or Sunday in any one work-week, he shall be paid for all such hours worked at the overtime rate.

Section 4. The following days shall be recognized as holidays:

New Year's Day, Labor Day, Memorial Day, Armistice Day, Independence Day, Thanksgiving Day and Christmas Day.

When any of the above holidays fall on Sunday, then the day designated by the Governor of the State of California shall apply, in such cases, as the holiday.

Section 5: A minimum of four (4) hours pay shall be allowed whenever employees are ordered to report to work whether the job lasts less than four (4) hours or not. Where an employee works in excess of four (4) hours, he shall be allowed eight (8) hours pay, except on Saturdays. Such pay for hours not worked shall be at straight time except on a holiday when it shall be at time and a half. Overtime shall not be pyramided or duplicated. [20] An employee shall receive pay hereunder only for hours actually worked if he elects to leave the yard,

or refuses to do other work, or if the Employer is unable to furnish him work because of inclement weather, mechanical breakdown (other than of the employee's own truck), or other condition beyond his control.

Section 6. No driver shall work a split shift. No more than one-half ( $1\frac{1}{2}$ ) hour will be deducted for lunch unless the truck is in the dispatching yard, or unless the job to which the material is being delivered is working on an hourly lunch period basis; any more than one (1) hour shall be classified as a split shift. Lunch period will be between the fourth (4th) and sixth (6th) working hours.

Section 7. When more than one (1) shift is required on continuous pours requiring changing of shifts away from the yard, traveling time at the straight time rate, shall be paid drivers going to and coming from points of operation. Transportation to and from job to be furnished by employer.

Section 8. Whenever special setups are created on, or adjacent to, large projects for the purpose of batching or transit mix, etc., where an agreement with the contractors on said projects carries a higher rate than provided for herein, the higher wage scale prevailing on the project shall apply. [21]



## EXHIBIT C

## Article IV.

Section 1. The schedule of wages to be paid under this agreement to the various classifications of employee is as follows:

Classification	Minimum Straight Time Wage Rates Effective Nov. 1, 1949		
Driver of plant trucks,			
8 tons and under .....	\$1.50	per hour	
over 8 tons to 12 tons .....	1.55	" "	
Drivers of: 4 wheel trucks .....	1.50	" "	
6 wheel trucks .....	1.55	" "	
Drivers of semi under 14 tons .....	1.60	" "	
Drivers of truck-trailer & semis ....	1.65	" "	
Drivers of transit mix trucks .....	1.75	" "	
Drivers of flats under 5 tons .....	1.50	" "	
over 5 tons .....	1.60	" "	
Truck trailer & semis .....	1.70	" "	
Gas station operators:			
Washers .....	1.50	" "	
Greaser .....	1.60	" "	
Tiremen .....	1.60	" "	
Warehousemen .....	1.45	" "	
Warehouse foreman .....	1.50	" "	
Mechanic .....	1.90	" "	
Mechanic helper .....	1.75	" "	
Bunkerman & loaders .....	1.45	" "	
Batch plant operators (manual) ....	1.70	" "	

Section 2. In all classifications time and one-half the straight time shall be paid for all time classed

as overtime at the rate paid in the period overtime occurred.

Section 3. Eight (8) hours shall constitute the regular work day. Forty (40) hours, beginning on Monday through Friday, shall constitute the regular straight time work-week except that: (a) In weeks in which a holiday occurs, or the employee is off a day because [22] of an excused absence, or laid off because of lack of work, the straight time work-week is 32 hours. (b) In weeks in which a holiday occurs, or the employee is off two days because of an excused absence, or laid off because of lack of work, the straight time work-week is 24 hours. Overtime at one and one-half times ( $1\frac{1}{2}$ ) the straight time rate will be paid for hours worked over eight (8) per day or forty (40) straight time hours per week, except that in work-weeks in which holidays or excused absences occur, then overtime shall be paid for hours over 32 or 24, as the case may be. If an employee works only Saturday and/or Sunday in any one work-week, he shall be paid for all such hours worked at the overtime rate.

The Employer shall provide and maintain a time-clock for all employees covered by this agreement at their main plant. However, at Branch plants they must have an authorized or agreeable means of recording their time and shall require employees to register on it properly; said clock or card shall be accessible to the Union representative at all times. That only on actual Grievances shall the Union Representative have access to the Company books. How-



ever, he shall have the right to check time cards and payrolls and shall be furnished a true and certified copy of the Federal Government Payroll report.

Section 4. The following days shall be recognized as holidays:

New Year's Day, Labor Day, Memorial Day, Armistice Day, Independence Day, Thanksgiving Day and Christmas Day.

When any of the above holidays fall on Sunday, then the day designated by the Governor of the State of California shall apply, in such cases, as the holiday.

Section 5. A minimum of four (4) hours pay shall be allowed whenever employees are ordered to report to work whether the job lasts less than four (4) hours or not. Where an employee works in excess of four (4) hours, he shall be allowed eight (8) hours pay, except on Saturdays. Such pay for hours not worked shall be at straight time [23] except on a holiday when it shall be at time and one-half. Overtime shall not be pyramided or duplicated.

An employee shall receive pay hereunder only for hours actually worked; if he elects to leave the yard, or refuses to do other work or if the Employer is unable to furnish him work because of inclement weather, mechanical breakdown (other than of employees own truck) or other condition beyond his control.

Section 6. No driver shall work a split shift. No more than one-half ( $1\frac{1}{2}$ ) hour will be deducted for lunch unless the truck is in the dispatching yard, or unless the job to which the material is being delivered is working on an hourly lunch period basis; any more than one (1) hour shall be classified as a split shift. Lunch period will be between the fourth and sixth working hours.

Section 7. When more than one (1) shift is required on continuous hours requiring changing of shifts away from the yard, traveling time at the straight time rate shall be paid drivers going to and coming from points of operation. Transportation to and from the job to be furnished by the Employer.

Section 8. Whenever special set-ups are created on, or adjacent to large projects for the purpose of batching or transit mix, etc., where agreement with the contractors on said projects carries a higher rate than provided herein, the higher wage scale prevailing on the project shall apply. [24]

## EXHIBIT D

## Article IV.

Section 1. The schedule of wages to be paid under this agreement to the various classifications of employee is as follows:

## Minimum Straight Time Wage

Classification	Rates Effective Nov. 1, 1949		
Driver of plant trucks.			
8 tons and under .....	\$1.50	per hour	
over 8 tons to 12 tons .....	1.55	"	"
Drivers of 4 wheel trucks .....	1.50	"	"
6 wheels trucks .....	1.55	"	"
Drivers of semis under 14 tons .....	1.60	"	"
Drivers of truck-trailer & semis ....	1.65	"	"
Drivers of transit mix trucks .....	1.75	"	"
Drivers of flats under 5 tons .....	1.50	"	"
over 5 tons .....	1.60	"	"
Truck-trailer & semis .....	1.70	"	"
Gas station operators:			
Washers .....	1.50	"	"
Greaser .....	1.60	"	"
Tiremen .....	1.60	"	"
Warehousemen .....	1.45	"	"
Warehouse foreman .....	1.50	"	"
Mechanic .....	1.90	"	"
Mechanic helper .....	1.75	"	"
Bunkerman & loaders .....	1.45	"	"
Batch plant operators (manual) ....	1.70	"	"

Section 2. In all classifications time and one-half the straight time shall be paid for all time classed

as overtime at the rate paid in the period overtime occurred.

Section 3. Eight (8) hours shall constitute the regular work day. Forty (40) hours, beginning on Monday through Friday, shall constitute the regular straight time work-week except that: (a) In weeks in which a holiday occurs, or the employee is off a day because [25] of an excused absence, or laid off because of lack of work, the straight time work-week is 32 hours. (b) In weeks in which a holiday occurs, or the employee is off two days because of an excused absence, or laid off because of lack of work, the straight time work-week is 24 hours.

Overtime at one and one-half times ( $1\frac{1}{2}$ ) the straight time rate will be paid for hours worked over eight (8) per day or forty (40) straight time hours per week, except that in work-weeks in which holidays or excused absences occur, then overtime shall be paid for hours over 32 or 24 as the case may be. If an employee works only Saturday and/or Sunday in any one work-week, he shall be paid for all such hours worked at the overtime rate.

The Employer shall provide and maintain a time clock for all employees covered by this agreement at their main plant. However, at Branch plants they must have an authorized or agreeable means of recording their time and shall require employees to register on it properly; said clock or card shall be accessible to the Union Representative at all times. That only on actual grievances shall the Union Rep-

representative have access to the Company books. However, he shall have the right to check time cards and payrolls and shall be furnished a true and certified copy of the Federal Government Payroll report.

Section 4. The following days shall be recognized as holidays:

New Year's Day, Labor Day, Memorial Day, Armistice Day, Independence Day, Thanksgiving Day and Christmas Day.

When any of the above holidays fall on Sunday, then the day designated by the Governor of the State of California shall apply, in such cases, as the holiday.

Section 5. A minimum of four (4) hours' pay shall be allowed whenever employees are ordered to report to work whether the job lasts less than four (4) hours or not. Where an employee works in [26] excess of four (4) hours, he shall be allowed eight (8) hours pay, except on Saturdays. Such pay for hours not worked shall be at straight time except on a holiday when it shall be at time and one-half. Overtime shall not be pyramided or duplicated.

An employee shall receive pay hereunder only for hours actually worked; if he elects to leave the yard, or refuses to do other work or if the Employer is unable to furnish him work because of inclement weather, mechanical breakdown (other than of employees own truck) or other condition beyond his control.



Section 6. No driver shall work a split shift. No more than one-half ( $\frac{1}{2}$ ) hour will be deducted for lunch unless the truck is in the dispatching yard, or unless the job to which the material is being delivered is working on an hourly lunch period basis; any more than one (1) hour shall be classified as a split shift. Lunch period will be between the fourth and sixth working hours.

Section 7. When more than one (1) shift is required on continuous hours requiring changing of shifts away from the yard, traveling time at the straight time rate shall be paid drivers going to and coming from points of operation. Transportation to and from the job to be furnished by the Employer.

Section 8. Whenever special set-ups are created on, or adjacent to large projects for the purpose of batching or transit mix, etc., where agreement with the contractors on said projects carries a higher rate than provided herein, the higher wage scale prevailing on the project shall apply.

Duly verified.

[Endorsed]: Filed March 27, 1953. [27]

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[Title of District Court and Cause.]

## NOTICE OF MOTION TO DISMISS ACTION

To the Plaintiff Above Named and to Stevenson &  
Richman, His Attorneys:

You and each of you will please take notice that defendant will move the above-entitled Court on



Monday, June 29th, 1953, at 2 o'clock p.m. in the courtroom of the above-entitled Court located in the Federal Building at San Diego, California, for its order dismissing your complaint.

Said motion will be made upon the ground that the Court lacks jurisdiction over the subject matter of the action for the reason that there is another action pending between the parties in the Superior Court of the State of California in and for the County of Imperial, being Civil No. 26771, which said action involves exactly the same subject matter as the action before this Court. [29]

Said motion will be based upon all of the pleadings and records in this case.

Attached hereto is a memorandum of authorities in support of said motion.

Dated June 24, 1953.

/s/ HORTON & KNOX,  
Attorneys for Defendant.

Affidavit of Service by Mail Attached.

[Endorsed]: Filed June 25, 1953. [30]

United States District Court for the Southern  
District of California, Southern Division

No. 1485-SD

BEAUMONT SILVERTON, etc.,

Plaintiff,

vs.

VALLEY TRANSIT CEMENT CO., INC., et al.,

Defendants.

### JUDGMENT OF DISMISSAL

This cause came on to be heard on defendant's motion to dismiss and upon plaintiff's motion to amend his complaint, and the Court having received a stipulation by the parties hereto to submit the respective motions of the defendants and plaintiff upon the record and without oral argument, and the Court thereafter denied plaintiff's motion and granted defendant's motion to dismiss,

It Is Hereby Ordered, Adjudged and Decreed that plaintiff's motion to amend is hereby denied, and that defendants' motion to dismiss the action is hereby granted for lack of jurisdiction over the subject matter of the first thirteen causes of action, and for failure to join an indispensable party to the fourteenth through the twenty-sixth causes of action, and that the action be dismissed accordingly. [32]

It Is Further Ordered that the judgment of dismissal shall not constitute an adjudication upon the merits.

Dated this 17th day of December, 1955.

/s/ WM. C. MATHES,

United States District Judge.

Affidavit of Service by Mail Attached.

[Endorsed]: Filed December 19, 1955.

Docketed and Entered December 19, 1955. [33]

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[Title of District Court and Cause.]

### NOTICE OF APPEAL

To the Honorable United States District Court for  
the Southern District of California, Southern  
Division:

The plaintiff hereby appeals from that Judgment  
of Dismissal docketed and entered December 19,  
1955, and appeals to the Court of Appeals, 9th Cir-  
cuit.

Dated: This 17th day of January, 1956.

JOHN C. STEVENSON and  
LIONEL RICHMAN,

By /s/ LIONEL RICHMAN,

Attorneys for Plaintiff.

Affidavit of Service by Mail Attached.

[Endorsed]: Filed January 25, 1956. [38]

[Title of District Court and Cause.]

### CERTIFICATE BY CLERK

I, John A. Childress, Clerk of the United States District Court for the Southern District of California, do hereby certify that the foregoing pages numbered 1 to 39, inclusive, contain the original

Complaint;

Notice of Motion & Motion to Dismiss Action;

Judgment of Dismissal;

Designation of Record on Appeal;

Notice of Appeal;

and a full, true and correct copy of Notification of Entry of Judgment of Dismissal, all in the above-entitled cause, constitute the transcript of record on appeal to the United States Court of Appeals of the Ninth Circuit, in the above case.

I further certify that my fees for preparing the record on appeal amount to \$2.00, which sum has been paid by appellant.

Witness my hand and the seal of the said Court this 5th day of March, 1956.

[Seal]

JOHN A. CHILDRESS,

Clerk;

By /s/ CHARLES E. JONES,

Deputy.

[Endorsed]: No. 15055. United States Court of Appeals for the Ninth Circuit. Beaumont Silverton, Individually and as a Member Representative and Secretary of Teamster Local Union No. 898, Affiliated with the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America and the American Federation of Labor, Appellant, vs. Valley Transit Cement Company, Inc., a Corporation, Appellee. Transcript of Record. Appeal from the United States District Court for the Southern District of California, Southern Division.

Filed March 6, 1956.

/s/ PAUL P. O'BRIEN,  
Clerk of the United States Court of Appeals for the  
Ninth Circuit.

In the United States Court of Appeals  
for the Ninth Judicial Circuit

No. 15055

BEAUMONT SILVERTON, etc.,

Plaintiff and Appellant,

vs.

VALLEY TRANSIT CEMENT CO., INC., et al.,

Defendants and Respondents.

APPELLANT'S STATEMENT OF POINTS  
AND DESIGNATION OF RECORD PUR-  
SUANT TO RULE 17(6)

The sole point upon which Appellant intends to rely is that the Court below erred in dismissing the first thirteen causes of action for lack of jurisdiction, and will contend that the United States District Court had, and still has, jurisdiction over the causes of action represented by the first through the thirteen causes of action.

Appellant will rely upon the Complaint and the Motion to Dismiss as that part of the record in the above-cause pertinent to the appeal.

Dated: This 14th day of March, 1956.

JOHN C. STEVENSON and  
LIONEL RICHMAN,

By /s/ LIONEL RICHMAN,

Attorneys for Plaintiff and  
Appellant.

Affidavit of Service by Mail Attached.

[Endorsed]: Filed March 16, 1956.